83700-7
No. 37303-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SCOTT MERRIMAN and KIM MERRIMAN, husband and wife,

Appellants/Cross-Respondents,

v.

PAUL COKELEY and DIANNE COKELEY, husband and wife,

Respondents/Cross-Appellants

BRIEF OF APPELLANTS/CROSS-RESPONDENTS MERRIMAN IN RESPONSE AND REPLY

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TABLE OF CONTENTS

SUPPLEMENTAL TABLE OF AUTHORITIES

Cases – Washington **Page**

Statutes

Other Authority

I. INTRODUCTION REPRISE

This quiet title action seeks to resolve a boundary dispute based on the well-established doctrine of mutual recognition and acquiescence. The issue on appeal asks the proof necessary to establish a "well-defined line."

The parties own adjoining, narrow waterfront lots (Lot 10 Merriman and Lot 11 Cokeley). This boundary dispute stems from an error in the survey of Lot 11 in 1993 by surveyor Swift.

The Cokeleys' predecessor Ward Willits testified at trial that surveyor Swift's bars and caps marked the common boundary line of Lot 10 and 11.

Mr. Willits testified that he always believed the bars and caps set in 1993 marked the boundary of the Willits property. Concerned for possible encroachment in 2002, Willits installed a two-strand barbed wire fence on the survey line of 1993.

The Cokeleys purchased the property in spring 2004 from Willits. In August 2006, Cokeleys ordered a survey of Lot 11.

The difference in the common boundary from the survey of 1993 and 2006 leaves a narrow, wedge-shaped strip of land in dispute starting at the road and increasing to nearly two feet in width at the other end of the property, at the top of the bank adjacent to the water.

Mr. Studeman, as a licensed surveyor, testified at trial that a bar and cap is the common practice by which surveyors mark a property boundary.

II. ARGUMENT

A. The Appeal.

The Merrimans' appeal focuses primarily on the trial court's error in not finding that the Merrimans established their right to the disputed property through mutual recognition and acquiescence. In their brief, the Merrimans demonstrate how the evidence at trial unambiguously supports their claim as a matter of law. The conclusions of the trial court were inconsistent with the testimony and evidence at trial, and were not properly supported by substantial evidence, undermining the validity of the trial court's ultimate legal conclusion. The Merrimans established their claim to the disputed property under the doctrine of mutual recognition and acquiescence. Alternatively, the Merrimans assert that they met their burden of proof on adverse possession.

Nothing in Cokeleys' brief refutes this result.

1. Mutual Recognition and Acquiescence.

The Merrimans' appeal brief established that the evidence at trial met the requirements under Washington law for establishing a boundary under the doctrine of mutual recognition and acquiescence. No matter how much Respondents might wish otherwise, continually mis-stating the law and evidence in this case does not make it so. The repeated failure of Cokeleys to cite to the record for most of their conclusory statements speaks to the very fact that the record does not support what they hope for.[1]

a. Well-defined line.

The first element of the Merrimans' mutual recognition and acquiescence claim requires, as correctly noted by Cokeleys, that the line is "certain, well defined, and in some fashion physically designated upon the ground, e.g., by *monuments*, roadways, fence lines, etc." Cokeleys' Brief at 19, quoting *Lamm v. McTighe*, 72 Wn. App. 587, 592-93 (1967). Cokeleys repeatedly profess no "certain or well-defined line upon the ground." This was and is simply not the case.

The parties offer no dispute that the survey markers set by Mr. Swift in his 1993 survey ran along what was believed to be the boundary line. CP 72 ¶ 6; CP 73 ¶ 7; RP 84-87 (hiring of 1993 survey to mark

[1] RAP 10.3(5) ("Reference to the record must be included for each factual statement")

boundary). Mr. Willits testified several times over that the survey monuments and the posts he erected near those monuments shortly after the survey formed a straight, well-defined line. RP 99, ll. 5-11; RP 111, l. 10 - 112, 1. 6. Scott Merriman's testimony is in accord. RP 125, ll. 5-18.

The witnesses at trial offered no dispute that from the time of the survey until the Cokeley' new survey in 2006, the neighbors understood the straight and well-defined line marked by the 1993 Swift survey monuments to be the boundary, and all knew about the monuments marking that line. RP 86, ll. 9-18; RP 87, ll. 12-15; RP 90, ll. 13-16; RP 99, ll. 5-11; and RP 111, l. 10 - 112, 1. 6 (Mr. Willits' testimony); RP 125, ll. 5-18 (Scott Merriman's testimony); RP 138, ll. 6-23 (Mr. Cokeley's testimony).

Similarly, the parties provide no dispute that survey monuments are recognized both in practice and in law as official markers of boundary lines. "In general, the line must be marked in that manner that customarily marks a division of ownership." Powell on Real Property, Boundaries §68.05[5] [b] at 68-28 (1998). The Cokeley's own expert surveyor testified that bars and caps, such as those set during the 1993 Swift survey, are commonly accepted markers for identifying surveyed boundaries. RP 14, ll. 1-10, 18-25; RP 17, l. 24 – 18, l. 3; and RP 21, ll. 20-23. The trial court in this very case recognized the survey markers as "clearly" placed. RP 187, ll. 16-17.

As quoted in the Merrimans' brief, the Washington Supreme Court has recognized since 1925 that survey markers are sufficient to mark a line *without* an accompanying fence. *Farrow v. Plancich,* 134 Wash. 690, 691 (1925) ("Though the old fence is gone, one of the original [surveyor] line stakes still exists, and there ought to be no trouble in actually locating that line on the ground.").

The same is true here: the undisputed testimony affirms that the parties had "no trouble in actually locating that line on the ground" because of the 1993 Swift survey markers. In their own brief Cokeleys cite to the record affirming not only the placement of these markers in 1993, but Mr. Willits' (the Cokeleys' predecessor) own placement of above-the-ground markers near the survey markers shortly after the survey in early 1994. Cokeleys' Brief at 8. The Cokeleys' surveyor, Mr. Bruce Studeman, testified that his survey crew readily found the three Swift bars and caps set in 1993. RP 14, ll. 1-10; RP 15, ll. 8-21; RP 21, ll. 8-11. Mr. Willits testified that he, too, easily found the survey markers with just a little clearing. RP 106, ll. 2-12. In fact, Mr. Willits testified that the 1993 survey marker was "fairly obvious" because of the metal T-post he had inserted to clearly mark the boundary, "so that one was fairly easy to find." *Id.*; *see also* RP 89, ll. 12-15 ("Q: … And the purpose of these posts [erected by Mr. Willits a few months after the 1993 survey] was to

make it obvious where the boundaries or corners of your property were? A: Correct.).

Cokeleys cite to *Frolund v. Frankland*, 71 Wn.2d 812, 816-20, 431 P.2d 188 (1967), *overruled on other grounds, Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984), which held that the existence of ascertainable survey markers are sufficient to establish a "clear and definitive line" notwithstanding vegetation overgrowth over the years.

Cokeleys attempt to dismiss this case as not controlling, claiming that because some remnants of a dilapidated fence remained in *Frolund,* then therefore the fence posts were still critical to establishing a "well-defined" line. This argument misreads the *Frolund* case, which relied on the survey markers as legally sufficient markers of the boundary *despite* the *lack* of a clear fence-line. *Id.*

The Court should note that the *Frolund* court also found that once a boundary is established on one part of the property, that boundary line would naturally be drawn in a straight line through undeveloped portions of the property. The same is true in the case at bar with the upland portion of the properties. *Id.* at 819-20.

Cokeleys grasp at the prickly straw of blackberry vines that overgrew the boundary line over time and were cleared before the Cokelys purchased the property. The trial court fell into this trap as well, buying into the argument that a fence line was needed to meet the burden.

Both were wrong, as such conclusion ignores established Washington law: *Frolund* specifically holds that obscuring vegetation does not change the fact that a boundary is marked and well-defined where there are survey markers.

To argue any differently defies basic common sense, particularly in a case such as the instant one—the neighbors *admit* to knowing where the old survey markers and Mr. Willits' posts were, and further admit to *believing* that the markers designated the true boundary line from the Swift survey in 1993 until the new survey in 2006.

b. *Recognition and acceptance of line manifested by acts of neighbors.*

The second element required for a claim of mutual recognition and acquiescence is that the adjoining landowners "in good faith manifested, by their acts, occupancy, and improvements with respect to their respective properties, a mutual recognition and acceptance of the designated line as the true boundary line." *Lamm*, 72 Wn. App. at 592-93; Cokeleys' Brief at 19.

Cokeleys repeatedly reference the lack of evidence of 'use" of the property. Aside from being an incorrect representation of the testimony, Cokeleys appear to confuse adverse possession with the doctrine of mutual recognition and acquiescence. The Merrimans' burden was not to show *use*, but rather evidence of the neighbors' *recognition and acceptance* of the certain and well-defined line established by the 1993 Swift survey

markers. *Lamm*, 72 Wn. 2d at 593. This proof can be either by express agreement or implied by acts, occupancy and improvements. *Houplin v. Stoen*, 72 Wn.2d 131, 137 (1967).

The Merrimans' Brief provides several examples of the *undisputed* testimony at trial that *all* of the affected neighbors acknowledged, recognized and accepted the boundary established by the 1993 Swift survey markers as the true boundary during the requisite ten years. The requisite ten years had run its course before the Cokeleys bought the property. *See, e.g.,* RP 86, ll. 9-18; RP 87, ll. 12-15; RP 90, ll. 13-16; RP 99, ll. 5-11; and RP 111, l. 10 - 112, 1. 6 (Mr. Willits' testimony); RP 125, ll. 5-18 (Scott Merriman's testimony); RP 138, ll. 6-23 (Mr. Cokeley's testimony).

A few examples show undisputed trial testimony that describes the Merriman family's acts, occupancy, and improvements to their property consistent with the agreed upon boundary line, at RP 38-40. (Kim Merriman—mowed area consistent with [property line] staking, watered and fertilized the grass, clipped the ivy and blackberry bushes, whacked weeds).

Mr. Willits' acts, occupancy, and improvements likewise showed his agreement with the boundary line. He maintained his property up to the boundary line. RP 44-45 (took branches down, mowed back blackberry bushes, sprayed herbicide on blackberry bushes and ivy).

Scott Merriman's trial testimony is in accord. RP 121-124 (general landscaping, changing landscape from grass to native plants, maintenance).

Cokeleys make much of Mr. Willits' construction of the wire fence in 2002, arguing that this fence was not *on* the line but rather some inches inside the boundary marked by the 1993 Swift survey markers. There is some dispute on this point, as indicated in the Merrimans' Assignment of Error No. 4 and the related discussion in the Merrimans' Brief.

The trial court stated that Mr. Willits constructed the fence slightly inside the property line, as Mr. Willits testified was his normal practice. RP 114, ll. 14-22 (Mr. Willits' testimony); RP 192, ll. 10-19 (trial court's oral decision); CP 73 ¶ 11 (findings of fact/conclusions of law).

However, the actual testimony is that with respect to *this* fence, Mr. Willits changed his normal practice and instead put the new posts *on* the line, consistent with the survey markers. RP 111, l. 15 – 112, l. 6. There is no other evidence in the record to support the trial court's conclusion, and this finding was in error.

But in the end, this dispute is irrelevant to the legal error. No one refutes that the testimony unambiguously reflects that Mr. Willits considered and utilized the 1993 survey markers as the property line. Therefore, however one interprets Mr. Willits' testimony, Mr. Willits used the 1993 Swift survey markers as the boundary line reference in building

the 2002 two-strand fence. Whether Mr. Willits erected the fence *on* or *inside* the line, he always referred to the 1993 Swift markers as "the line." This evidence establishes an unambiguous recognition and acceptance of the line demarcated by the 1993 Swift survey markers since the markers were set.

c. Recognition and acceptance over ten years.

The third and final element the Merrimans established is that the mutual recognition and acquiescence continued for a period of ten years, the period required for adverse possession. *Lamm*, 72 Wn. App. at 593; RCW 4.16.020(1)(adverse possession); Respondents' Brief at 19.

The setting of the three survey marker "monuments" in 1993 by surveyor Mr. Swift per Cokeleys' predecessor Willits began the statutory period. The Cokeleys did not dispute the location of the boundary established by the 1993 survey markers until their survey in August 2006, well beyond the necessary ten years. RP 138, ll. 6-23. Cokeleys did not assert the new boundary until the 2006 survey, because they too believed the 1993 Swift survey markers to designate the true boundary line. RP 138, ll. 17-23. Before then, even the Cokeleys shared Mr. Willits' belief from the beginning that the 1993 Swift survey markers lay on the true boundary. RP 138, ll. 6-23.

Cokeleys claim Mr. Willits' 2002 fence as the first time any action established a well-defined line. But in making this argument, Cokeleys

ignore the fact that Mr. Willits simply built the fence along the line that they had already believed for *nine years* previously to be the true boundary: Willits' built the fence along the wood and metal posts on that line just months after the 1993 survey.

In summary, the evidence at trial unambiguously supports the Merrimans' claim to the disputed area under the doctrine of mutual recognition and acquiescence, when Washington law is correctly applied to the facts.

2. Adverse Possession.

To establish a claim of adverse possession, the claimant's possession must be proved to be (1) exclusive, (2) actual and uninterrupted, (3) open and notorious, and (4) hostile. *ITT Rayonier, Inc. v. Bell,* 112 Wn. 2d 754, 757 (1989). As discussed above, the Merrimans established *irrefuted and unambiguous testimony* of the long-term recognition and acceptance of the boundary marked by the 1993 Swift survey monuments. The only additional issue on adverse possession would be whether the Merrimans showed sufficient "use."

Cokeleys suggest that the lack of use of the upland, wooded, undeveloped area negates the Merrimans' claims. That is not the law. In *Frolund*, the court held in accord with well-established Washington law that it is "essential" to bear in mind that the nature of the use of property in an adverse possession claim "necessarily depends to a great extent upon

the nature, character, and locality of the property involved and the uses to which it is ordinarily adapted or applied." In other words, "we have accepted the view that the necessary occupancy and use of the property involved need only be of the character that a true owner would assert in view of its nature and location." *Frolund,* 71 Wn.2d at 816-18 (citations omitted). Thus, the evidence at trial was sufficient to establish the use required to support the Merrimans' adverse possession claim, as set forth in their Brief.

That evidence included the following: The neighbors used the disputed area up to the agreed upon 1993 line as general landscaping, including grass mowing, watering and fertilizing, weed whacking, herbicide spray, tree pruning, and changing the landscaping from grass to native plants. Specific examples of trial testimony on these points include RP 38-40, 44-45, and 121-124. These activities represent simple general landscape maintenance uses between neighbors who knew where the line was and used the land up to the line.

At a minimum, the trial court failed to fully weigh the evidence with respect to this claim, and the trial court's decision was not supported by substantial evidence when looking at the facts in the record.

B. <u>The Cross-Appeal.</u>

Cokeleys fail to do much better in supporting their own cross-appeal. Their scant argument is empty of supporting citation to the record,

in violation of RAP 10.3(5). The reason for that is simple: the record fails to support the Respondents' claims on cross-appeal, which all revolve around the trial court's denial of their various theories of recovery for fees and costs.

1. Costs under CR 68 (offer of settlement).

a. *To encourage settlement and avoid lengthy litigation*

CR 68 is intended to encourage settlements and avoid lengthy litigation. *Wallace v. Kuehner*, 111 Wn. App. 809, 823 (2002). Neither of those objectives was met here. As indicated on Respondents' offer, Respondents served the offer *exactly* ten days before the first day of trial. This late notice was just an attempt to shift costs should the Cokeley's prevail - it did *nothing* to effect an early settlement or avoid lengthy litigation for either side. Therefore, as a matter of policy, the trial court was right in denying Cokeleys' request for costs under CR 68.

b. *Failed notice*

In addition, the only evidence in the record shows that this offer was submitted to counsel Mr. Goldstein's office, who was not the primary counsel for the Merrimans and served in an advisory role only. Mr. Tom Miller submitted all pleadings relating to this case, and argued the case at trial. There is no evidence on the record that the offer of settlement was timely submitted to Mr. Miller within the required ten days before trial.

The other flaw to Cokeleys' request under CR 68 is the failure of the offer of settlement to include any disposition of fees and costs for either party. In comparing a CR 68 offer of settlement against the final trial result for purposes of ascertaining whether or not the recipient of the offer bettered his position at trial, the trial court must "compare comparables," including attorney fees where attorney fees are a potential piece of the recovery sought. *Magnussen v. Tawney*, 109 Wn. App. 272, 275-76 (2001). Here, Cokeleys sought attorney fees and costs in relation to their various claims. It is unclear whether these claims for fees and costs would be part of what was withdrawn, as the offer of settlement states only that "defendants agree to withdraw their *counterclaim* [singular] in exchange for a settlement as described above." Therefore, the offer provides no proper basis for comparing this offer of settlement against the ultimate result, which denied Cokeleys their claims for fees and costs.

Because the record is not properly provided by Cokeleys as the requesting party, the trial court was correct in denying costs under CR 68.

c. *Premature and fatal*

Finally, Cokeleys submitted their request for costs prematurely, thus voiding their request. CR 68 states that "An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs." Cokeleys' offer was submitted pursuant

to "RCW 4.84, et. seq., and CR 68 and CRLJ 68." These various bases for collection of fees and costs are frequently considered together in the case law. RCW 4.84.280 unambiguously prohibits submission of such offers before judgment, and violation of this statute precludes the offeror from collecting *any* fees or costs as a prevailing party. *Hanson v. Estell*, 100 Wn. App. 281, 290-91 (2000).

Here, the trial was November 20, 2007. The Cokeleys filed a motion for award of attorneys' fees December 3, 2007, attaching the offer of settlement. CP 80 ¶ 1. The trial court did not enter judgment until entry of the findings of fact, conclusions of law and order on January 4, 2008. CP 71-79. The trial court issued the second order regarding the attorney fees request on the same day as the trial order, January 4, 2008. CP 80-81.

Cokeleys violated RCW 4.84 by submitting the offer of settlement before entry of judgment. As Cokeleys' offer was specifically submitted under RCW 4.84 as well as CR 68, the trial court had equitable grounds for denying the request for CR 68 costs because of the premature submission of the offer in violation of RCW 4.84.

d. Underlying statute is RCW 7.28, which carries no attorney fee award

The underlying statute in this action is not the lis pendens statute RCW 4.28.328 as presented by defendants. The lis pendens statute was invoked to support the filing of a counterclaim by defendants. The underlying statute at trial was RCW 7.28 et. seq. to quiet title in the disputed area between the parties' respective real property boundaries, which carries no attorney fee award. The trial court denied the Merrimans' claim to quiet title except for the conceded fire-pit area. The court likewise denied the counterclaim of Cokeleys for a wrongfully recorded lis pendens under RCW 4.28.328(3).

CR 68 is a cost-shifting device and not a fee-shifting device. "Costs" do not include attorney fees unless the statute or agreement states otherwise. *Eagle Point Condo Owners' Ass'n v. Coy,* 102 Wn.App. 697, 707, P.3d 898 (2000); *Sims v. KIRO Inc.*, 20 Wn.App. 229, 238, 580 P.2d 642, (1978); *Fiorito v. Goerig*, 27 Wn.2d 615, 619, 179 P.2d 316 (1947) (the term "costs" does not include attorney fees absent a statute or agreement providing otherwise).

The well-settled rule states that an award of attorney fees under CR 68 relies on whether the underlying statute has a provision for attorney fees. *Hodge v. Development Services* 65 Wn. App. 576, 828 P.2d 1175 (1992). The underlying action in the case at bar is to quiet title. If the quiet title statute has no provision for attorney fees, then none may be awarded in defense of quiet title action under CR 68. The quiet title statute

RCW 7.28 has no provision for attorney fees. The court confirmed that under CR 68 "without statutory provisions, costs do not include attorney fees." 65 Wn. App. at 583. None may be awarded here pursuant to defense of the quiet title action.

Further, the lis pendens statute only provides for attorney fees on a limited basis if the court finds no substantial justification for recording the lis pendens. At trial the defense presented almost no evidence in presentation of its counterclaim for wrongful filing and the trial court rightfully denied the Cokeleys' claim. The Cokeleys by their lack of any evidence conceded that the lis pendens recording was valid

2. Costs under RCW 4.84.250 (amount pleaded less than $10,000).

a. *Premature submission*

Cokeleys next claim that they are entitled to both fees and costs under RCW 4.84.250, which provides possible fees and costs to a prevailing party where the damages pled by that party are less than $10,000. However, Cokeleys ignore the law. RCW 4.84.280 states that evidence of such an offer shall *not* be submitted into evidence until *after* judgment. While Cokeleys cite to *Hanson v. Estell* for support in other arguments, Cokeleys neglect to inform the Court that this case *also* held that where a settlement offer under 4.84.250 was communicated to the trial court prematurely, *before* the judgment was entered, the movant thus

negates his right to such fees and costs by violating the statute. 100 Wn. App. at 290-91. Here, Cokeleys submitted the offer of settlement *before* the trial court entered its judgment, contrary to the statute. Under *Hanson,* Cokeleys' impatience and resulting violation of the statute negated their right to recover fees under RCW 4.84.250.

b. *Fail statutory requirements*

Even if Cokeleys had not negated their claim through their own actions, this statute allows for fee and cost shifting only in cases where the amount *pleaded* by the prevailing party is under $10,000. Here, the only amount pleaded is the $50,000 that Cokeleys asserted in their amended counterclaims. CP 35. As it happens, Cokeleys lost on that counterclaim. If that amount pleaded had been less than $10,000, the *Merrimans* would be the ones entitled to recovery of fees and costs.

Nor may the Cokeleys argue any basis in fact or law that some other value amount allows the Cokeleys to utilize this limited statute. This case addresses the narrow strip of land between two surveys of Lots 10 and 11. The Cokeleys, as prevailing party on this issue at the trial level, never pleaded any amount under $10,000 relating to this claim, as required by RCW 4.84.250.

Cokeleys established no value at trial. The trial court held that Cokeleys failed to establish any loss of value regarding the two allegedly "lost sales," or any impact on plans to develop the property. The

information on the record was too vague or speculative to determine value. RP 197, ll. 5-22; 198, l. 8–199, l. 2.

With respect to any alleged value of the disputed strip of land, Cokeleys failed to plead a value of less than $10,000, nor did they put anything on the record at trial as to a value of this strip of land equaling less than $10,000. The only evidence at trial relating to the value of this land at all is the trial court's recognition that the Cokeleys bought the property for $80,000, i.e., $49,000 less than originally discussed before the Merrimans asserted rights to the disputed property. RP 196, l. 22–197, l. 4. Thus the only testimony on the record is a possible market value of $49,000 for this disputed strip of land, far outside the scope of RCW 4.84.250.

c. *Statute not applicable*

Finally, Cokeleys ignore the fact that the Merrimans *won* on some claims, including the acquired title to certain portions of the property at issue, and defeating the Cokeleys' counterclaims for monetary damages in their entirety. This result brings into question whether Cokeleys are indeed the "prevailing party" at all, even if the amount in controversy fell under the statutory limit. Cokeleys claim that the Merrimans are precluded from being considered the "prevailing party" because they did not achieve better results than the offer of settlement. Cokeleys fail to cite

any case law on this point, perhaps because the cases also say the following:

(1) This doctrine does *not* apply to determination on fees, because the offer of settlement is a cost-shifting, not a fee-shifting, device; and, critically,

(2) Where a party has allowed the other to maintain the lawsuit for a substantial length of time at considerable expense, submitting an offer of settlement at the eleventh hour before trial, the courts will *not* utilize the offer of settlement to strip the responding party of its status as a prevailing party, even if the result does not improve upon the offer of settlement, because such a result would be highly inequitable. This is the case here, where the offer of settlement was not submitted until exactly 11 days before trial.

Eagle Point Condo Owners' Ass'n v. Coy, 102 Wn. App. 697, 707-09 (2000).

The trial court was correct in determining that RCW 4.84.250 did not apply to this case. Cokeleys' claims for fees under this statute border on frivolous, given that Cokeleys' own actions in submitting the offer of settlement prematurely; violating the statute and negating their right to claim such fees and costs; and never pleading any value for less than the required $10,000.

3. Costs under RCW 4.28.328(3) (lis pendens).

The Cokeleys' final attempt to recover fees and costs suffers the weakest argument of all. Cokeleys claim that they were entitled to recover fees and costs under the lis pendens statute, RCW 4.28.328(3). But that statute only allows for fees where there is no substantial justification for the lis pendens, and even then, only upon the trial court's discretion.

The Merrimans brought this quiet title action to affirm the boundary. This was and is a legitimate dispute. The trial court found that it was not only proper to have filed notice of the boundary dispute, but that it would have been "unconscionable" *not* to, given the inequity to prospective purchasers of that property in dispute. RP 195 ll. 7-18. Cokeleys offer not one citation to any evidence on the record that Merriman lacked substantial justification for the lis pendens. Quite likely, this is because there is no such evidence.

Finally, Cokeleys make the odd argument that the lis pendens was somehow inappropriate because it affected the entire property when the dispute itself affected only part of the property. First, the lis pendens statute itself dictates that a lis pendens is appropriate when a claim potentially affects title. Title to a parcel is either affected or it is not – the physical proportion of property at issue is irrelevant.

Second, the Cokeleys' own argument at the other end of their brief belies their argument here. Cokeleys claimed throughout this lawsuit, and

again in their Brief, that the disputed property could mean the difference between maintaining a permit for the septic, and perhaps even for the home that is currently permitted. *See, e.g.,* Respondents' Brief at 6-7. Thus, Cokeleys can hardly argue that the dispute over this "small" strip of land does not touch on the entire parcel. Their own counterclaim relies on the very opposite argument.

In short, the trial court was correct in determining that RCW 4.28.328(3) does not apply to this case. Even if it might, the court had the discretion to award fees and costs – or not. The Cokeleys provide no evidence, law or facts suggesting that the trial court abused its discretion in this regard. In fact, quite the opposite, as once again Cokeleys' argument borders on the frivolous, given the bona-fide boundary dispute, and Cokeleys' own argument for damages relating to a change in ownership of the disputed strip of property.

III. CONCLUSION

In conclusion, it may prove helpful to review the facts as the record reflects, and how they play into Washington law under the Merrimans' assignments of error.

The Merrimans' first assignment of error states that the trial court erred when it failed to find that the facts, as found, established a "well-defined" line. The line was sufficient to meet the burden of proof of mutual acquiescence to the true boundary line between the two lots, given

the undisputed survey monuments set during the 1993 Swift survey and Mr. Willits' erection of marker posts a few months later. Mr. Willits' 2002 fence, based on the 1993 and 1994 markers as a reference, further demonstrated the straight and well-defined nature of this line established by those markers. Cokeleys failed to show any facts or case law to support the trial court's error in applying Washington law to the facts of this case.

The Merrimans' second assignment of error states that the trial court erred when it held, based on the facts as found, that Merriman failed to meet their overall burden of proof establishing that they acquired title to the disputed property by mutual acquiescence to the true boundary line, where (1) survey monuments marked the line; (2) the neighbors all testified as to their knowledge of the 1993 and 1994 markers, and their belief and acceptance up until 2006 that these markers designated the true boundary line; and (3) such recognition and acceptance occurred from 1993 to 2006—well over the required ten years.

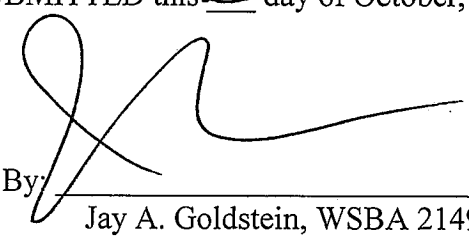
The Merrimans' third assignment of error states that the trial court erred when it failed to find, as an alternative remedy, that Merriman met their burden of proof based on the facts presented establishing that they acquired title to the disputed property by adverse possession, as the

testimony at trial demonstrated use of the disputed area by the Merrimans consistent with the nature of the property.

The remaining assignments of error are factual in nature, and the Cokeleys have failed to demonstrate evidence on the record refuting the Merrimans' claims as to these relatively minor mis-statements by the trial court.

In short, the Merrimans established their claim over the disputed property under Washington law. Cokeleys' various requests for costs and fees were rightfully denied, and Cokeleys' appeal on these issues borders on the frivolous given that Cokeleys' own actions and argument preclude the recovery they seek. To the extent allowable, the Merrimans thus request their attorney fees and costs on appeal, in particular with regard to defending against the cross-appeal.

RESPECTFULLY SUBMITTED this 2 day of October, 2008.



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DECLARATION OF SERVICE

On the 2 day of October, 2008, I delivered, via the method specified below, the following documents to the following individual at the following address:

a. BRIEF OF APPELLANTS/CROSS-RESPONDENTS MERRIMAN IN RESPONSE AND REPLY;
b. APPELLANT MERRIMAN'S SUPPLEMENTAL DESIGNATION OF CLERKS PAPERS
c. DECLARATION OF SERVICE

JAY A. GOLDSTEIN ● LAW OFFICE, PLLC
1800 Cooper Point Road SW, No. 8 ● Olympia, WA 98502
FAX 360-357-0844 ● VOICE 360-352-1970
jay@jaglaw.net

____	U.S. Mail 1st Class	TO: Ken Valz
____	U.S. Mail, Certified, Return Receipt Requested	Valz, Houser, Kogut and Barnes, P.S.
___	Legal Messenger Service	1800 Cooper Pt. Rd #15
__x__	Hand delivered	Olympia, WA 98502
____	U.S. Mail 1st Class	TO:
____	U.S. Mail, Certified, Return Receipt Requested	Thomas Miller
___	Legal Messenger Service	PO Box 12406
__X__	Hand delivered	Olympia, WA 98508

I declare, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

Signed this 2 day of October, 2008, in Olympia, Washington.

DONNA WAITE
Paralegal to JAY A. GOLDSTEIN

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